IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.S.RADHAKRISHNAN
&
THE HONOURABLE MR. JUSTICE V.RAMKUMAR

TUESDAY, THE 25TH JULY 2006 / 3RD SRAVANA 1928

C.E.Appeal.No. 26 of 2005()

AGAINST THE ORDER DATED 23/02/2005 IN ORNO.477/05 IN APPEAL NO.ST/36/2004 of CUSTOMS,EXCISE & SERVICE TAX APPELLATE TRIBUNAL ,KOCHI

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APPELLANT/RESPONDENT:

COMMISSIONER OF CENTRAL EXCISE,
THIRUVANANTHAPURAM.

BY ADV. SRI.S.KRISHNAMOORTHY, ADDL.CGSC

RESPONDENT: APPELLANT:

M/S. KERALA STATE ELECTRICITY BOARD,
REPRESENTED BY ITS SECRETARY, VIDHYUTHI BHAWAN,
PATTOM, THIRUVANANTHAPURAM.

BY ADV. SRI.C.S.GOPALAKRISHNAN NAIR
SRI.G.SAMPATH
SRI.S.REGHU

THIS CENTRAL EXICISE APPEAL HAVING BEEN FINALLY HEARD ON 22/06/2006, THE COURT ON 25/07/2006 DELIVERED THE FOLLOWING:

K.S. RADHAKRISHNAN & V. RAMKUMAR, JJ.

C.E. Appeal No 26 of 2005

Dated: 25th July 2006

JUDGMENT

Radhakrishnan, J.

This appeal is preferred by the Commissioner of Central Excise under Section 35 (G) of the Central Excise Act, 1944 aggrieved by the order passed by the Customs, Excise and Service Tax Appellate Tribunal, Circuit Bench, Cochin holding that service tax shall not be demanded from the Kerala State Electricity Board as per the Service Tax Rules.

2. Following are the questions of law framed in the appeal for our consideration.

i) Where the service is volunteered by the service receiver from a foreign company having no office in India under an agreement, is it the service receivers liability to pay service tax on behalf of the service provider, prior to the amendment of Rule 6 (1) of the Service Tax Rules on 16.8.2002.

ii) is it not the service receiver who acts as an agent or authorised person when an agreement is entered into between a foreign service provider and an Indian service receiver,within the meaning of Rule 6 (1) of the Service Tax Rules,

iii) after the amendment of Rule 6 of the Service Tax Rules, with effect from 16.8.2002, merely because an office of the service provider with the employees and staff of the service receiver had been opened in the service receivers premises, does it take away the liability of the service receiver to pay service tax?

iv) is it not the amendment to Rule 6 of the Service Tax Rules, introduced with effect from 16.8.2002 which enables the rendering of service from a Foreign country and when the service is rendered physically in India, is it not the liability of Service Tax shouldering upon

the person who receives service and acting as an agent/authorised person?

v) under the law of the land whether a contractual agreement takes away the liability to pay service tax;

vi) when the contract entered into between the service receiver and service provider stipulates that all tax liability and other expenditure will be borne by the service receiver and such relevant materials has to be given to the service receiver sufficiently in advance to take appropriate action, is it not the service receiver's liability to pay service tax?

vii) when legally there is service tax liability in a transaction whether the parties should be allowed to escape from their liability to pay service tax due by taking recourse to mere submissions not based on fact or law.

Viii) whether the office mentioned under Rule 6 (1) of the Service Tax Rules, need be an office registered in India or having control within territory of India for legal records.

We are satisfied from the pleadings of the parties as well as from the proceedings of the Commissioner that the following substantial questions of law are involved in this case. We formulate the following questions of law as per sub-section (3) of Section 35G of the Central Excise Act, 1944.

A) Is not the service receiver liable to pay service tax prior to the amendment of Rule 6 (1) of the Service Rules as it stood prior to 16.08.2002 and subsequent to the said date in view of clauses 16.1, 16.2, 18.1, 18.2 of the agreement entered into between the service provider and the service receiver.

B) Is not the service receiver liable to take up the responsibility of meeting the service tax demands from the excise authorities in view of clause 16.2 of the agreement through authorised person within the meaning of the proviso to sub-rule (1) of Rule 6 of the Service Tax Rules.

C) Is not the service provider liable to the penalty, interest or additional liability in case service provider personnel do not comply with the tax requirements.

The Kerala State Electricity Board (for short, the KSE Board) have entered into a contract with M/s SNC Lavalin Inc., Montreal, Canada to implement a project work of Kuttiyady Extension Scheme and also the Pallivasal, Sangulam and Panniyar upgradation projects. The KSE Board, assessee, has awarded the project work of Kuttiyadi Extension Scheme to SNC Lavalin at a cost of 2,64,55,525 Canadian Dollars for consultancy services provided by the firm. Similarly, assessee has awarded the modernisation of Pallivasal, Sengulam and Panniyar HE project at a cost of 5,27,58,740 Canadian Dollars for the cost of materials supplied by the firm and at 71,90,000 Canadian Dollars for consultancy services provided by them. On a verification of the annual accounts and connected documents it is seen that the KSE Board has paid an amount of 31,16,061.86 Canadian Dollars between February 1998 and May 2001 against the invoices issued by the consulting firm SNC Lavalin during the period from September 1997 to December 2000 as consultancy service charges for the services rendered for the above project.

3. The KSE Board has also awarded the modernisation of Pallivasal - Sengulam - Panniyar upgradation project to SNC Lavalin at a project cost of 5,27,58,740 Canadian Dollars for the cost of materials supplied by the firm and at 71,90,000 Canadian Dollars for consultancy services provided by them. Scrutiny of annual accounts and other documents maintained by the KSE Board revealed that the assessee has paid an amount of 60,98,282.83 Canadian Dollars between July 1998 and December 2002 against invoices issued by the

consulting firm during the period from July 1998 to December 2002 as consultancy service charges to the KSE Board for the services rendered for the project. Above facts would show that a total amount of consultancy charges received by SNC Lavalin for the above works would come to 92,14,344.69 Canadian Dollars.

4. The Government of India have introduced service tax on "Consultancy Engineering Services" with effect from 07.07.1997, vide notification No 23/97 dated 02.07.1997. Deputy Commissioner of Central Excise noticed that the KSE Board had contravened the provisions of Section 70 of the Finance Act, 1994 by not filing the prescribed return, Section 68 by not remitting the service tax due and Section 69 by not taking a Service Tax Registration. Deputy Commissioner therefore issued show cause notice dated 28.04.2003 to the KSE Board to show cause why service tax of Rs 1,38,21,517/- should not be demanded from them under Section 73 (a) of the Finance Act, 1994 as amended and interest at the appropriate rate under Section 75 and why separate penalty should not be imposed under Sections 75A, 76, 77 and 78 for non-registration, non-payment of service tax, non-filing of return and suppression of value of taxable service respectively.

5. The KSE Board submitted reply to the show cause notice pertaining to the Kuttiyadi Extension Scheme as well as to the Pallivasal, Sengulam and Panniyar upgradation projects. Reply refers to the contract entered into between KSE Board and SNC Lavalin, extract of which is produced and marked as

Annexure A6. Referring to the terms of the contract it was stated in the reply that the service rendered by M/s SNC Lavalin is taxable. All the same it is stated that at the time of introduction of Service Tax Rules, the responsibility for registration, charging, recovery and payment of service tax was on the service provider, that is, SNC Lavalin and that SNC Lavalin was having an office at the project site for Kuttiyadi Extension Scheme. It is also stated that in case SNC Lavalin or any of its expatriate personnel do not comply with the tax requirements which results in any penalty, interest or additional liability the same shall be borne by SNC Lavalin. It is also pointed out that it is the obligation of the KSE Board to pay the taxes as per the agreement and it is the responsibility of SNC Lavalin to register as a service tax payer or bound to file returns as required under the provisions of the Service Tax Act and if they do not comply with those requirements resulting in payment of any penalty, interest or additional liability and the same should be borne by SNC Lavalin. It is also pointed out that as per clause 16.2 of the agreement M/s SNC Lavalin shall provide the KSE Board the relevant orders, notices of demand, invoices, appellate orders and other relevant information as the proof of the actual tax liability to be borne by the KSE Board sufficiently in advance to enable the Board to take appropriate action in this connection. Further it is also pointed out that the KSE Board may request for exemption and if exemption is not granted the KSE Board shall pay service tax due.

6. The Deputy Commissioner of Central Excise considered the reply submitted by the KSE Board, perused the documents and heard the

representative of the KSE Board. Considering all the aspects of the matter, the Deputy Commissioner came to the conclusion that the KSE Board has failed to perform the statutory obligation under Sections 68, 69 and 70 of Chapter V and VA of the Finance Act, 1994. The Deputy Commissioner found that the KSE Board is liable to pay service tax amounting to Rs 1,37,43,435/- under Section 73 (1)(a) of Chapter V and VA of the Finance Act, 1994 and also imposed penalty of Rs 500/- and Rs 1000/- under Section 75A and 77 of Chapter V and VA of the Finance Act, 1994 as amended for non registration and for not filing ST-3 returns as prescribed.

7. The KSE Board took up the matter in appeal before the Commissioner of Central Excise (Appeals) who confirmed the finding of the Deputy Commissioner and dismissed the appeal. Matter was taken up before the Customs, Excise and Service Tax Appellate Tribunal. The Tribunal noticing, the rule which stood prior to 16.08.2002, took the view that the KSE Board cannot be considered as an agent of SNC Lavelin, Canada, since it is only a service receiver and not an agent of the foreign Company. The Tribunal also found that the KSE Board is not an agent nor an authorised person on behalf of the foreign Company since the KSE Board does not represent the foreign Company in India and that after 16.08.2002 when the rule was amended service tax shall be discharged by the person who received the service from the foreign company which does not have an office in India. After perusing the agreement the Tribunal took the view that the KSE Board is providing various facilities including air conditioned office to personnel of SNC Lavalin as per the contract

and therefore demand should have been made on the SNC Lavalin, the service provider. Tribunal therefore concluded that prior to 16.08.2002 service tax cannot be demanded from the KSE Board as the Board is not an agent or authorised person of foreign service provider and after 16.08.2002 amendment, the Board is not required to pay the tax as the foreign service provider has its office in India. The order of the Commissioner was therefore set aside. Aggrieved by the order of the Tribunal, Commissioner of Central Excise has filed the present appeal.

8. Counsel for the appellant Sri S.Krishnamoorthy submitted that the Tribunal has not properly appreciated the scope of Rule 6 of the Service Tax Rules which was in existence prior to the amendment on 16.08.2002 and thereafter. Counsel also submitted that the Tribunal has not properly appreciated the various terms and conditions of the agreement entered into between the service provider and the service receiver. Agreement, according to the counsel, would indicate that the service receiver is always acting as an authorised person for service provider within the meaning of Rule 6 of the Service Tax Rules. Counsel submitted that the service tax liability is not on the service provider but on the service receiver. Counsel submitted that the Tribunal has completely ignored the reply submitted by the KSE Board to the show cause notice wherein the KSE Board has clearly admitted that the actual service tax is to be borne by the KSE Board, the service receiver.

9. Counsel appearing for the KSE Board, Sri S. Raghu supported the findings of the Tribunal and contended that the KSE Board cannot be

considered as an agent of SNC Lavalin; nor an authorised person and that they do not represent SNC Lavalin in India. Resultantly liability on the service receiver is neither as an agent nor as an authorised person of the service provider. Even if the rule was amended on 16.08.2002 the Board cannot be treated as an agent or authorised person. Service provider has maintained an office in India and even prior to 16.08.2002 and thereafter and hence service receiver cannot be held liable for payment of service tax. Counsel however submitted that in any view of the matter no substantial questions of law arise for consideration within the meaning of Section 35G in this case and therefore prayed for dismissal of the appeal.

10. The Central Government in exercise of the powers conferred by sub-section (1) read with sub-section (2) of Section 94 of the Finance Act, 1994 made the Service Tax Rules, 1994 for the purpose of assessment and collection of service tax. Government of India have introduced Service Tax on "Consultancy Engineering Service" with effect from 07.07.1997 vide Notification No. 23/97 dated 02.07.1997. As per Section 65 (31) of the Finance Act, 1994 as amended, Consulting Engineer means any professionally qualified engineer or an engineering firm who, either directly or indirectly renders any advice, consultancy or technical assistance in any manner to a client in one or more disciplines of engineering. As per clause (g) of sub-section 105 of Section 65 of the Finance Act, 1994 as amended, the taxable service rendered by a Consulting Engineer has been defined as any service provided to a client by a Consulting Engineer in relation to advice consultancy or technical service in any

manner to a client in one or more disciplines of engineering. Indisputably SNC Lavalin is a consulting engineer as per the above mentioned provision and service rendered by them to the KSE Board is taxable as per the provisions of the Act.

11. The proviso to sub-rule (1) of Rule 6 of Service Tax Rules as it stood prior to 16.08.2002 stipulated that in the case of a person who was a non resident or was from outside India and did not have any office in India, the service tax due on the service rendered by him should be paid by such person or on his behalf by any other person authorised by him who should submit to the Commissioner of Central Excise in whose jurisdiction the taxable services had been rendered, a return containing specific details with necessary enclosures. Return along with a demand draft towards his service tax liability has to be submitted within a period of thirty days from the date of raising the bill on the client for the taxable services rendered. It was noticed that the above provisions of the Rules were not complied with either by SNC Lavalin or by the KSE Board, service receiver. In the proviso to sub-rule (1) of Rule 6 of Service Tax Rules with effect from 28.02.1999 it was stipulated that in case of a person who was a non resident or was from outside India and who did not have any office in India, the service tax due on the service rendered by him should be paid by such person or on his behalf by another person authorised by him who should submit to the Commissioner of Central Excise in whose jurisdiction the taxable services had been rendered, a return containing specific details with necessary enclosures. Going by the agreement executed between the service provider and

the receiver it is clear that the responsibility of paying service tax is on the service receiver. Annexure A6 is the agreement executed between them. Clause 16 of the agreement deals with SNC Lavalin's obligations for tax procedural requirements. Similar is the clause in the other agreement also. We may extract clauses 16.1, 16.2 and 16.3 for easy reference.

> 16.1 SNC Lavalin and all its expatriate personnel shall be responsible for timely and prompt filing of all returns, documents, estimates, accounts, information and details complete and accurate in all respects as may be required under the applicable laws/regulations in India before the appropriate authorities in India. In case SNC Lavalin or any of its expatriate personnel do not comply with the above tax requirements, which results in any penalty, interest or additional liability, the same shall be borne by SNC Lavalin.
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> 16.2 SNC Lavalin shall provide KSEB the relevant orders, notices of demand, invoices, appellate orders and other relevant information as the proof of the actual tax liability to be borne by KSEB, sufficiently in advance to enable KSEB to take appropriate action in this connection.
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> 16.3 SNC Lavalin and its expatriate personnel, if required by KSEB, shall contest appeals against any assessment/demand of an appropriate authority before such authority at the request of and cost and expenses of KSEB.
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> (emphasis added)

It is evident from clause 16.1 that service provider and its expatriate personnel shall be responsible for timely and prompt filing of all returns, documents, estimates, accounts, information and details complete and accurate in all respects as may be required under the Rules. In case service provider or any of its expatriate personnel do not comply with the tax requirements, it will result in penalty, interest or additional liability and the same shall be borne by SNC Lavalin and not by the service receiver. Clause 16.2 states that the tax liability

will be borne by the service receiver. Service provider shall provide the service receiver the relevant orders, notices of demand, invoices, appellate orders and other relevant information as proof of the actual tax liability. Service receiver on receipt of the proof of actual service tax liability would take appropriate action in meeting the tax liability or contest the appeals against the assessment orders through the service provider. Responsibility is however cast on the service provider to file returns, estimates accounts, documents etc. Service provider is also responsible to meet the penalty, interest, additional liability in case they do not comply with the tax requirements such as of filing return, estimate etc. in time. Clause 16.3 states that SNC Lavalin and its expatriate personnel need contest appeals against any assessment/demand of an appropriate authority before such authority at the request of and cost and expenses of the service receiver. It is therefore evident from the above mentioned clauses that the actual tax liability is on the service receiver and not on the service provider.

12. We may in this connection refer to the reply of the Board, the service receiver to the show cause notice, which is as follows:

> " In case SNC Lavalin or any of its expatriate personnel do not comply with the above tax requirements, which results in any penalty, interest or additional liability, the same shall be borne by SNC Lavalin. According to clause 16.2, SNC Lavalin shall provide, KSE Board the relevant orders, notices of demand, invoices, appellate orders and other relevant information

> as the proof of the actual tax liability to be borne by KSEB, sufficiently in advance to enable KSEB to take appropriate action in this connection. The obligation of KSEB is to pay the taxes only as per information/certificate furnished by their tax consultants. In the light of the above position it is submitted that KSE Board is not duty bound to register as a Service Tax payer or bound to file returns as required under the relevant provisions of the Act. "

It is also stated in the reply as follows:

> "Since the work were done for public interest, it is requested that Board may be exempted from payment of Service Tax and favourable decision may be passed on to KSE Board, if not exempted, KSE Board shall pay the Service Tax due. As per Clause 16.1 of the agreement M/s SNC Lavalin is responsible for payment of any penalty, interest or additional liability, if they do not comply with the tax requirement. Hence, it is requested that the interest and other charges if any may be recovered from M/s SNC Lavalin and the notices in this regard may be served to M/s SNC Lavalin for effecting reovery."

Going by the terms and conditions of the agreement entered into between the service provider and the service receiver as well as the reply to the show cause notice submitted by the KSE Board it is very clear that the service provider is expected to make payment of only penalty, interest or additional liability in

case such a demand was made by the authorities and on the failure to file proper returns, documents, estimates, accounts, information etc. So far as the actual tax liability is concerned, the KSE Board, the service receiver has taken up the responsibility. Service provider need only submit notice of demand, invoices etc. as proof of tax liability to the service receiver and the same will be borne by the service receiver. Service provider is also not expected to contest those orders and they need challenge the orders only if so required by the KSE Board that too, the costs and expenses of the said challenge have to be borne by the service receiver.

13. We are therefore of the considered view that as per sub-rule (1) of Rule 6 as it stood prior to 16.08.2002 and going by the agreement as well as the reply to the show cause notice it is clear that the service receiver is the authorised person to meet the service tax liability. Even after the amendment of the rule with effect from 16.08.2002 agreement still holds good and the service receiver has taken up the responsibility of meeting the service tax liability. The question as to whether service provider has got an office in India is doubtful. According to the service receiver, office was being maintained in room No 201, Vydyuthi Bhavan of the service receiver and that is as good an office within the meaning of the amended Rules and hence service receiver has no liability. We find it difficult to accept the said contention. The mere fact that the service provider has provided with an office in the building owned by the service receiver it cannot be treated as an office or registered office of a foreign company. No materials have been produced to show that the service

provider has got an independent registered office in India. In any view, going by the agreement entered into between the service provider and service receiver and also the reply made by the Board, it is evident that service tax liability is to be borne by the service receiver and not on the service provider.

14. In such circumstances, we are inclined to allow this appeal and set aside the judgment of the Tribunal. The order of the assessing authority stands restored. Questions raised are answered in favour of the appellant. We are informed that the service receiver has already met the service tax liability, in our view, rightly. Appeal is allowed as above.

Sd/-

(K.S. RADHAKRISHNAN, JUDGE)

Sd/-

(V. RAMKUMAR, JUDGE)

25/07/2006

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